

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2  
3 KATHLEEN HEIKKILA and GLEN COOK,

4  
5 Petitioner,

6 v.

7  
8 CITY OF WINLOCK,

9 Respondent.  
10

**CASE NO. 09-2-00013c**

**ORDER GRANTING MOTION FOR  
RECONSIDERATION**

11  
12 This matter comes before the Board on Motions for Reconsideration of the Board's June 1,  
13 2009 Order on Dispositive Motion in the 09-2-0009c case, later consolidated with this one.  
14 That Order granted the City of Winlock's (City) motion dismissing both Petitioner Cook's and  
15 Petitioner Heikkila's SEPA related issues. Cook's Motion for Reconsideration<sup>1</sup> was filed on  
16 June 5, 2009 and Heikkila filed a similar Motion on June 8, 2009.<sup>2</sup>  
17

18 The City did not file any response to the motions within the time authorized for answers to  
19 motions for reconsideration (five days),<sup>3</sup> let alone the time to respond to motions in general  
20 (ten days).<sup>4</sup>  
21

22  
23 **DISCUSSION**

24 A motion for reconsideration of a decision of a Board is governed by WAC 242-02-832. It  
25 provides, at WAC 242-02-832(2), that a motion for reconsideration must be based on at  
26 least one of the following grounds:

- 27 (a) Errors of procedure or misinterpretation of fact or law, material to the party seeking  
28 reconsideration;  
29  
30

31 <sup>1</sup> Petitioner Cook's Request for Reconsideration of Board's Order on Dispositive Motion.

32 <sup>2</sup> Petitioner Heikkila's Request for Reconsideration of Board's Order on Dispositive Motion.

<sup>3</sup> WAC 242-02-832(1).

<sup>4</sup> WAC 242-02-534(1).

- 1 (b) Irregularity in the hearing before the board by which such party was prevented from  
2 having a fair hearing; or  
3 (c) Clerical mistakes in the final decision and order.

4 Petitioner Cook asserts reconsideration is warranted pursuant to WAC 242-02-832(a) –  
5 misinterpretation of law and fact. Petitioner Heikkila does not specifically provide a basis  
6 for the request, but the Board assumes the arguments allege misinterpretations of law.  
7

8 Cook sets forth two bases for reconsideration: 1) The Board erred in its interpretation that  
9 Ordinance 933 provides a SEPA appeal mechanism for rezones and development  
10 regulations; 2) The Board erred by retroactively applying its decision to overrule its prior  
11 holdings that there is no need to exhaust administrative remedies.<sup>5</sup>  
12

13 Heikkila concurs with the argument put forth by Cook and, in addition, argues that the City's  
14 Ordinance establishing the duties and jurisdiction of the City's Hearing Examiner is limited to  
15 land use decisions within the city limits and that the SEPA challenges asserted by the  
16 Petitioners involve land use decisions affecting properties both within and outside of the city  
17 limits.<sup>6</sup>  
18

19 The Board will address the retroactive application of its decision first as a decision in  
20 Petitioners' favor on that issue would preclude the need for discussion of the City's SEPA  
21 appeal procedures.  
22

#### 23 Retroactivity of the Board's Decision

24 Cook's primary argument is that the Board erred by retroactively applying its decision to  
25 overrule a prior holding finding the principal of exhaustion of administrative remedies did not  
26 apply to SEPA matters before the Growth Management Hearings Board. Cook states it is  
27 "well-settled" in Washington that reinterpretations of laws or regulations are only applied  
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<sup>5</sup> Cook Request for Reconsideration, pgs. 1 and 4.

<sup>6</sup> Heikkila Request for Reconsideration, pgs 1-3.

1 prospectively.<sup>7</sup> In support of his argument, Cook refers to *Champagne v. Thurston County*.<sup>8</sup>

2 In the *Champagne* decision, the Court stated that, in general:

3 . . . [w]e presume a prospective application of newly amended administrative  
4 regulations, particularly where the amendments change substantive rights.<sup>9</sup>

5  
6 However, the Board is not faced with a newly amended administrative regulation, but rather  
7 the applicability of RCW 43.21C.075(4) (the SEPA requirement for exhaustion of remedies)  
8 to SEPA related challenges before the Growth Management Hearings Board. RCW  
9 43.21C.075(4) provides: <sup>10</sup>

10 4) If a person aggrieved by an agency action has the right to judicial appeal and  
11 if an agency has an administrative appeal procedure, such person shall, prior to  
12 seeking any judicial review, use such agency procedure if any such procedure is  
13 available, unless expressly provided otherwise by state statute.

14 In fact, Contrary to Cook's assertion, it appears to be "well settled" that **retroactive**  
15 **application is the general rule** when announcing a new rule of law in a civil case.<sup>11</sup>

16 However, the case law also reflects a concern that retroactivity may unjustifiably affect a  
17 litigant's vested interests, such as interests in property, contract, or taxation.<sup>12</sup> This concern  
18 is also reflected in Cook's assertion that retroactive application of the rule violates due  
19 process. A due process violation would result if retroactive application deprived an individual  
20 of a vested right. A vested right entitled to protection under the due process clause "must  
21 be something more than a mere expectation based upon an anticipated continuance of the  
22 existing law; it must have become a title, legal or equitable, to the present or future  
23  
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26  
27 <sup>7</sup> Cook Request for Reconsideration at 5.

28 <sup>8</sup> 178 P. 3d 936 (2008).

29 <sup>9</sup> *Champagne v. Thurston County*, 163 Wn2d 69,79 (2008).

30 <sup>10 10</sup> The Board addressed the different positions of the Growth Management Hearings Boards in regards to  
31 exhaustion in its Order on Dispositive Motions. In summary, the Western Board, contrary to our colleagues at  
32 the Eastern and Central Puget Sound Boards, had held the SEPA exhaustion requirement was inapplicable.  
In *WEAN v. Island County*, Case No. 03 -2- 0008, this Board signaled a possible intent to reconsider its prior  
position.

<sup>11</sup> In re Det of Audett, 148 Wn,2d 712,720-721 (2006); *Lunsford v. Saberhagen Holdings, Inc.* Docket 80728-1  
(June 4, 2009).

<sup>12</sup> *Lunsford v. Saberhagen Holdings, Inc.* Docket 80728-1 (June 4, 2009).

1 enjoyment of property, a demand, or a legal exemption from a demand by another"<sup>13</sup> That is  
2 not the situation before us and no deprivation of due process has occurred.

3  
4 Although vested, substantive interests in property, a contract, or in regards to taxation are  
5 not involved in this matter, the Board is mindful of the need to consider the impact on the  
6 parties, particularly if they justifiably and reasonably relied on the Board's prior holding.  
7 While the Board in *WEAN v. Island County*<sup>14</sup> appeared to signal an intent to reverse its  
8 *Island County Citizens' Growth Management Coalition v. Island County* holding<sup>15</sup>, that  
9 indicator was less than clear. Cook and Heikkila both assert they relied on the Board's prior  
10 holding.<sup>16</sup> With the City's failure to file a response, that assertion has not been rebutted.  
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12  
13 In light of the foregoing, including Cook and Heikkila's assertions of substantial reliance on  
14 this Board's prior holding in *Island County*, and the lack of any response from the City to the  
15 Petitioners' motions, the Board will grant Petitioners' motions to reconsider and reinstate  
16 Cook Issue 2 and Heikkila Issue 7.

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18 Having reached that determination, the Board need not consider Cook's argument that the  
19 City fails to provide a SEPA appeal mechanism applicable under the facts before us and  
20 Heikkila's argument that any appeal mechanism is limited to properties within the City's  
21 jurisdictional limits.  
22

23 Although, based on the facts of this case, the Board declines in this instance to retroactively  
24 apply its decision, it is important to restate our holding set forth in the Order on Dispositive  
25 Motions:  
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31 <sup>13</sup> State the Hennings, 129 Wn. 2d 512, 528-529 (1996); see also Washington State Farm Bureau Federation  
32 v. Gregoire, 162 Wn. 2d 284, 305.

<sup>14</sup> *WEAN v. Island County*, Case No. 03-2-0008, FDO, August 25, 2003.

<sup>15</sup> Case No. 98-2-0023c, Order on Motions to Dismiss, March 1, 1999.

<sup>16</sup> Cook Request for Reconsideration at 5; Heikkila Request for Reconsideration at 2.

“ We hereby overrule the prior holding of the Western Board in regards to the need to exhaust administrative remedies prior to seeking a review of a SEPA decision before the Board.”<sup>17</sup>

That decision will be applied prospectively from the date of the Board's Order on Dispositive Motion in this matter, May 29, 2009.

## ORDER

The Board grants the Petitioners' motions for reconsideration and Cook Issue 2 and Heikkila Issue 7 are hereby reinstated.

Dated this 30<sup>th</sup> day of June, 2009.

William Roehl, Board Member

James McNamara, Board Member

Nina Carter, Board Member

17 Order on Dispositive Motion, pg. 7, May 29, 2009  
ORDER GRANTING MOTION FOR RECONSIDERATION  
Case No. 09-2-0013c  
June 30, 2009  
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